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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Please deliver to:
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002

Re: *Qwest Communications International, Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services In Colorado, Idaho, Iowa, Nebraska and North Dakota*, WC Docket No. 02-148

Dear Ms. Dortch:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's June 13, 2002 Public Notice Requesting Comments are an original and four (4) copies of the Comments of Vanion, Inc.

Please date stamp and return the enclosed extra copy of this filing. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,

Harisha J. Bastiampillai

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	WC Docket No. 02-148
	)	
Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota	)	

COMMENTS OF
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July 3, 2002

SUMMARY

Vanion, Inc. is an integrated communications provider that offers a wide array of integrated voice and data communications services. To facilitate its provisioning of these services, Vanion must resell Qwest "last mile" facilities. Contrary to Qwest's representations in its application that it provides resale services "equal in quality" to those of its retail services, Vanion has encountered significant limitations on Qwest's resale products that render those products inferior to what Qwest offers customers on a retail basis.

One example of a Qwest resale product that is rendered inferior by the limitations Qwest places on the product is Qwest's Local Area Data Service ("LADS"). Qwest does not offer a process whereby bridged tap and/or load coils will be removed from these facilities. Qwest does offer a process for removal of inhibitors if the facility is purchased as a UNE and presumably would remove the inhibitors for its retail service if the customer so requested. Thus, carriers reselling these facilities will be unable to provide a full array of services over these facilities, including DSL. Ironically, the CLEC ordering the Local Area Data Service facility will be unable to provide data service if the facility has bridge tap or load coils.

Vanion is also unable to obtain conditioned flat rate business lines for megabit services. While in theory Vanion can order this service, the reality is much different. Vanion is required to submit an order for the facility, then submit a conditioning request. After going through these steps, Vanion still finds that 90% of its orders are rejected on the basis that DSL is not available for these facilities. Meanwhile, if a Qwest customer orders line sharing, and designates Vanion as its internet service provider ("ISP"), the

customer can obtain the same facilities that were previously "unavailable." By failing to develop a seamless OSS process for the ordering of these facilities, Qwest is clearly attempting to limit the ability of other carriers to offer competitive local exchange services to its customers.

Vanion has also experienced other problems with Qwest such as the imposition of significant termination liability provisions for the conversion of retail circuits to wholesale circuits and bad faith disputes in regard to payment for termination of local traffic. All these practices taken together serve to limit the viability of resale as a market entry strategy in the Qwest region. The Section 271 Checklist clearly mandates that Qwest must provide a viable and comparable resale product and Qwest is failing to meet its obligations in this regard.

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Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota	)	

COMMENTS OF VANION, INC.

Vanion, Inc. ("Vanion") submits these comments concerning the above-captioned Consolidated Application by Qwest Communications, International ("Qwest") for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota filed June 13, 2002 ("Application").[1]

Vanion, Inc. is an integrated communications provider offering a wide array of integrated voice and data communications services to businesses. Vanion offers services including dial-up Internet access, DSL, dedicated internet access and dedicated voice services. Vanion began as an internet service provider and is now a CLEC. Vanion currently provides service in Colorado and plans to extend its CLEC operations to states in the Qwest region. Vanion is currently reselling the "last mile" Qwest services and is interconnected with Qwest for access to the public switched telephone network ("PSTN"). Vanion is a carrier that is evolving into a full-service facilities-based carrier.

[1] Comments Requested on the Application By Qwest Communications International, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In

Qwest's practices, however, are impeding this evolution and impeding the introduction of competitive services in the Qwest region. For the reasons stated herein, the Federal Communications Commission ("Commission") should deny the Application.

I. QWEST FAILS TO MEETS ITS CHECKLIST 14 OBLIGATIONS IN REGARD TO RESALE OF LOCAL AREA DATA SERVICE

A. Legal Standard

Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[2] Section 251(c)(4)(A) requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[3] Section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on service resold under section 251(c)(4)(A)."[4] The Commission has concluded that resale restrictions are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is reasonable and nondiscriminatory.[5]

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the States of Colorado, Idaho, Iowa, Nebraska and North Dakota, Public Notice, WC Docket No. 02-148, DA 02-1390, released June 13, 2002.

[2] *Application by Verizon New Jersey, Inc., et al., for Authorization to Provide In-Region, InterLATA Services In New Jersey*, WC Docket No. 02-67, FCC 02-189, Memorandum Opinion and Order (June 24, 2002) ("*New Jersey 271 Order*"), Attachment C, at ¶ 67, *citing*, 47 U.S.C. § 271(c)(2)(B)(xiv).

[3] *New Jersey 271 Order*, Attachment C, at ¶ 67, *citing*, 47 U.S.C. § 251(c)(4)(A).

[4] *New Jersey 271 Order*, Attachment C, at ¶ 67, *citing*, 47 U.S.C. § 251(c)(4)(B).

[5] *New Jersey 271 Order*, Attachment C, at ¶ 67, *citing*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket. No. 96-98, CC Docket No. 95-185, 11 FCC Record 15499, ¶ 939 (1996) (*Local Competition Order*) (subsequent history omitted); 47 C.F.R. § 51.613(b).

B. Qwest's LADS Product Does Not Meet the Commission's Resale Requirements

Qwest's resale practices in regard to local area data service ("LADS") demonstrate noncompliance with the requirements of Checklist Item 14. Qwest provides no internal process to have bridge tap and/or load coils removed from these lines. As the Commission has noted, use of inhibitors such as bridge tap and load coils can impede the use of the loop to provide advanced services, and the Commission has mandated that incumbent LECs are required to condition loops so as to allow requesting carriers to offer advanced services.[6] As the Commission has noted, "[s]uch devices, however, diminish the loop's capacity to deliver advanced services, and thus preclude the requesting carrier from gaining full use of the loop's capabilities."[7] Thus, Vanion is unable to use these loops to provide xDSL service which is one of the vital services that it offers to its customers. Vanion requested via the Change Management Process that Qwest implement a process to remove bridge tap and/or load coils from LADS, but Qwest denied the request. Meanwhile, Qwest offers to remove bridge tap and/or load coils for UNE loops and presumably will do the same if one of its retail customers requires a conditioned loop.

The purchase of these loops as UNEs is not a viable option for Vanion because to purchase UNEs, Vanion must collocate. Qwest's nonrecurring charges for collocation in a central office amount to $60,000 per central office which imposes a significant barrier

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[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98 at ¶ 172 (1999) ("*UNE Remand Order*").

[7] *UNE Remand Order* at ¶ 172.

to entry. It is unclear why Qwest imposes these exorbitant charges to collocate where there is ample space in its central offices that has been built out for other carriers and is no longer in use due to those carriers going out of business. Upon information and belief, Qwest is investigating the development of a new collocation product that will allow CLECs to use this already developed place, but it has not rolled out this product as of yet. Of course, the premium charges it now gets provides a disincentive for it to implement this new product.

Vanion, as noted above, is a carrier that is evolving and this type of evolution is something the Commission should seek to encourage. Vanion began as an internet service provider and is now a CLEC that provides service in part via resale of Qwest's "last mile" facilities. Vanion hopes to become a full-service integrated communications provider. Qwest's practices impede this evolution because Vanion cannot get the circuits it needs via resale to provide the services it seeks to offer. Moreover, Qwest's high collocation charges preclude the use of UNEs to provide these services. For Vanion to be able to afford the collocation charges it needs to develop its customer base, but it cannot develop its customer base if the restrictions Qwest imposes on its resale products impede Vanion's ability to provide a full array of competitive services to its customers. This is a clear Catch-22, and Qwest's practices demonstrate noncompliance not only with Checklist Item 14, but also the requirements of the Act.

Qwest's practices are clearly discriminatory not only vis-à-vis its retail services, but also vis-à-vis its UNE practices. Qwest, or CLECs purchasing UNEs, will be able to offer a full array of services to their customers while CLECs purchasing via resale will be unable to offer xDSL service. The facilities Qwest offers to CLECs via resale is not equal in quality to those it provides itself or via UNEs. The restrictions on LADS are also unreasonable because there is no reason why Qwest cannot offer the same process for removing bridge tap and load coils for LADS that it offers for UNE loops.

Thus, while Qwest contends that it has met its obligation to provide its telecommunications services for resale by CLECs on terms "at least equal in quality" as Qwest provides its retail services,[8] it clearly is not. Qwest contends that it is providing resale of unbundled DSL transmission services,[9] but its failure to provide LADS devoid of inhibitors is not providing the transmission service that a carrier would need to provide the services it seeks to provide. In fact, local area data service is a misnomer, because CLECs will be unable to provide data service over these facilities if bridge tap and/or load coils are present. Until Qwest develops a process for removal of these inhibitors on LADS, it cannot be found to be in compliance with the requirements of Checklist Item 14.

II. QWEST FAILS TO MEET ITS OBLIGATIONS IN REGARD TO CHECKLIST ITEMS 2 AND 14 IN REGARD TO FLAT RATE BUSINESS LINES

A. Legal Standard

Section 271 requires the Commission to determine whether a BOC offers nondiscriminatory access to OSS functions. Section 271(c)(2)(B)(ii) requires a BOC to "provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[10] The Commission has determined that access to OSS functions falls squarely within an incumbent LEC's duty under section

8 WC 02-148, Qwest Application, Declaration of Lori A. Simpson at ¶ 13.

9 Simpson Declaration at ¶ 24, n. 44

10 *New Jersey 271 Order*, Attachment C, at ¶ 26, *citing*, 47 U.S.C. § 271(c)(2)(B)(ii).

251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable.[11]

The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition. New entrants must have access to the functions performed by the incumbent's OSS in order to formulate and place orders for network elements or resale services and to install service to their customers. Without nondiscriminatory access to the BOC's OSS, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing "in the local exchange market."[12] As part of its statutory obligation to provide nondiscriminatory access to OSS functions, a BOC must provide access that sufficiently supports each of the three modes of competitive entry envisioned by the 1996 Act – competitor-owned facilities, UNEs and resale.[13] For OSS functions that are analogous to those that a BOC provides itself, its customers, or affiliates, the nondiscrimination standard requires the BOC to offer requesting carriers access that is equivalent in terms of quality, accuracy, and timeliness.[14] In regard to ordering, a BOC must demonstrate its ability to provide competing carriers with access to the OSS functions necessary for placing wholesale orders.

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[11] *New Jersey 271 Order*, Attachment C, at ¶ 26.

[12] *New Jersey 271 Order*, Attachment C, at ¶ 25.

[13] *New Jersey 271 Order*, Attachment C, at ¶ 27.

[14] *New Jersey 271 Order*, Attachment C, at ¶ 27.

B. CLECs Are Unable to Order for Resale Purposes Conditioned Flat Rate Business Lines for Megabit Services

Qwest fails to meet its obligations in regard to ordering DSL qualified lines in conjunction with Megabit services. If Vanion wants to order a DSL-conditioned flat rate business line ("1FB line"), Vanion must first order the 1FB line, and then place an order to have the line conditioned. After enduring this arduous, protracted process, 90% of Vanion's orders are rejected on the basis that DSL is not available. Thus, Vanion is effectively precluded from ordering these lines for its customers. Under Qwest line sharing, however, if the customer designates Vanion as its internet service provider, the line sharing is implemented and the requisite facilities are installed. Thus, the same facilities that Qwest claims could not be provided when Vanion ordered the facilities are installed in the line sharing arrangement. Vanion is effectively limited to being only the ISP for the customer, and cannot be the customer's LEC. The customer has to remain Qwest's customer, and order the service directly from Qwest to get the service it wants.

There is no reason why Vanion should be unable to order these facilities when the customer can get the same facilities as a Qwest retail customer. By failing to implement an ordering process whereby Vanion can seamlessly order these facilities, Qwest effectively precludes Vanion's ability to resell this service. Vanion has submitted a request via Qwest's change management process to have this problem rectified but has not heard back from Qwest. Upon information and belief, Eschelon Telecom submitted the same request to Qwest six months ago but it was rejected by Qwest.

It is also unclear why the process should be so arduous for ordering these facilities. In the line sharing context, CLECs can first submit the pre-order loop qualification process, and then submit the local service request ("LSR").[15] Here Vanion must submit the order, request line conditioning, and then subsequently find out that DSL is not available. This protracted process will imperil the ability of the CLEC to keep the customer, because the customer will be able to obtain the same service seamlessly from Qwest. A customer will not be willing to endure the multi-stage process that Vanion has to undertake, particularly if at the end of the day the facility is found to be not available. Qwest has not provided adequate OSS to facilitate these wholesale orders for conditioned 1FB lines, and its failure to do so will essentially lock in customers to Qwest's retail services.

III. QWEST DOES NOT COMPLY WITH CHECKLIST ITEM 13

Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[16] Section 252(d)(2)(A)(i) provides for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[17] Vanion has been duly providing CABS invoices to Qwest. These invoices cover the costs of terminating Qwest's customers' local and ISP calls to Vanion's customers.

Qwest disputes CABS invoices using a flawed one way process that is biased toward Qwest and disputes legitimate billing. Qwest requires Vanion to provide customer detail records ("CDRs") for about 10 million minutes worth of traffic in order for Vanion to receive payment on its invoices. Meanwhile, when Vanion requests CDRs

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15 WC 02-148, Qwest Application, Declaration of Karen A. Stewart at ¶ 30.

16 47 U.S.C. § 271(c)(2)(B)(xiii).

17 47 U.S.C. § 252(d)(2)(A)(i).

from Qwest, it takes months for Vanion to receive the information, and only after many battles with Qwest to receive the information. Qwest also threatens that if Vanion does not pay the bill it will get disconnected. Qwest is clearly taking advantage of its market power to impose one-sided requirements for payment of CABS invoices. Qwest expects timely payment and minute invoice detail from Vanion but will not offer the same in return. Qwest's practices preclude Vanion's ability to recover its costs of termination.

IV. QWEST'S PRACTICES IN REGARD TO CONVERSION OF RETAIL CIRCUITS DEMONSTRATE THAT ITS APPLICATION IS NOT IN THE PUBLIC INTEREST

Section 271(d)(3)(C) of the Act directs that the Commission shall not give Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."[18] The Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[19] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[20] The Commission has stated that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."[21] The Commission stated that it would not be satisfied that the public interest standard has

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[18] 47 U.S.C. § 271(d)(3)(C).

[19] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 383 (1997) ("*Ameritech Michigan 271 Order*").

[20] *Id.* at ¶ 385.

been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[22] As the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[23]

Qwest is engaging in practices that do not ensure that local markets are "fully and irreversibly" open to competition. Specifically, Qwest imposes onerous restrictions on the conversion of retail facilities into wholesale facilities. As noted above, Vanion, Inc. began operations initially as an ISP. As an ISP, Vanion purchased circuits from Qwest on a retail basis. Once Vanion became a CLEC it sought to convert those circuits into wholesale circuits. If the circuits were purchased under a particular term of service, however, Qwest seeks to impose significant termination liability amounts.

There is actually no termination involved in conversion of an existing Qwest service to a resale or wholesale service. The conversion should not require the disconnection of the circuit, but merely modification of billing information.[24] For instance, in the context of special access conversions, the FCC has said that a special access "conversion should *not* require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information

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[21] *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

[22] *Ameritech Michigan 271 Order* at ¶ 386.

[23] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[24] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, ¶ 30 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

associated with the circuit will change when a conversion is requested."[25] In the conversion, Vanion is not changing providers, but is merely switching to a different service offered by Qwest. Vanion will continue to pay the ILEC for the same circuit, and under the FCC's resale pricing rules, Qwest will recover its retail price minus avoided retail costs. Qwest will recoup its investment and then some, and competition will be promoted. This is not comparable to the actual disconnection of a service purchased on a term arrangement, where Qwest's investment could (arguably) be "stranded."

The Commission should require that Qwest not impose termination liability when Vanion is simply converting the same circuit from retail to wholesale. The Commission has previously determined that a fresh look policy benefits competition when "certain long-term special access arrangements may prevent customers from obtaining the benefits of the new, more competitive access requirements."[26] The Commission has noted that such agreements raise competitive concerns because they allow the incumbent to "lock up" the market.[27] In these instances, the Commission noted that it may limit the amount of termination penalties an ILEC customer must pay for ending its particular special access service.[28] The Commission has used similar fresh look approaches to promote competition in other markets.[29] The Commission notes that it may modify

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[25] *Supplemental Order Clarification* at ¶ 30 (emphasis added).

[26] *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order at ¶ 197 (1995).

[27] *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Second Memorandum Opinion and Order on Reconsideration at ¶ 3 (1993).

[28] *Id.* at ¶ 4.

[29] *Local Competition Order* at ¶ 195, n. 2635, *citing, Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, GEN Docket No. 88-96, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" requirements imposed in context of air- ground radiotelephone service as condition of grant of Title III license).

provisions of private contracts when necessary to serve the public interest.[30] The Michigan commission has disallowed termination penalties on conversion of LEC tariffed services to UNEs.[31]

The imposition of termination liability inhibits the ability of Vanion to provide competitive service. If Vanion does not convert the circuit, it cannot offer the facility at a price lower than what Qwest offers, and, therefore, will not be able to offer a potential customer a reason to change providers. If, however, Vanion pays the termination liability it will cut into, if not eviscerate, the already slim margins that resale rates provide. The Commission should find that Qwest's imposition of termination liability is not in the public interest because it inhibits the deployment of competitive services.

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30 *Local Competition Order* at ¶ 1095.

31 *In the Matter of the Petition of Level 3 Communications, LLC, for arbitration pursuant to Section 252 of the federal Telecommunications Act of 1996 to establish an interconnection agreement with Ameritech Michigan*, Case No. U-12460, Opinion and Order, at 29-30 (Oct. 24, 2000). *See also In the Matter, on the Commission's own motion, to investigate Ameritech Michigan's provision of intraLATA toll service to customers of competing basic local exchange service providers*, Case No. U-11525, Opinion and Order, at 19 (Mich. PSC Nov. 5, 1998) (ILEC is prohibited from imposing termination penalty under intraLATA toll tariff for the sole reason that a customer desires to switch basic local exchange service providers).

V. CONCLUSION

For the foregoing reasons, Vanion urges the Commission to deny Qwest's Application for Provision of In-Region InterLATA Services.

Respectfully submitted,

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July 3, 2002

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on July 3, 2002, I caused to be served upon the following individuals the Comments of Vanion, Inc. in WC Docket No. 02-148.

Harisha Bastiampillai

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